

FILED BY CLERK

AUG 14 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0012
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID O. SOTO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR94000386

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Diane Leigh Hunt

Tucson
Attorneys for Appellee

Joel Larson, Cochise County Legal Defender
By Bethany Graham

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Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 Appellant David Soto was convicted after a 1996 jury trial held in his absence of two counts of molestation of a child under the age of fifteen stemming from incidents occurring in 1994. Soto was arrested in 2011 and the trial court subsequently

sentenced him to consecutive, seventeen-year prison terms. As part of that sentence, the court also imposed an assessment of \$25.00 “pursuant to A.R.S. § 13-812.” Soto argues on appeal, and the state agrees, that the court erred in imposing the assessment because the statute permitting the assessment had been repealed before he committed the offenses¹.

¶2 Because Soto did not raise this argument below, despite the opportunity to do so, he has forfeited relief for all but fundamental, prejudicial error. *See State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009); *see also State v. Vermuele*, 226 Ariz. 399, ¶¶ 9, 14, 249 P.3d 1099, 1102, 1103 (App. 2011) (declining to apply fundamental error standard when defendant “had no clear procedural opportunity to challenge the rendition of sentence before it became final”). But the imposition of a sentence, including a penalty assessment, without statutory authority is fundamental, prejudicial error. *See Lewandowski*, 220 Ariz. 531, ¶¶ 4, 15, 207 P.3d at 786, 789; *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). Section 13-812 formerly provided for the direct collection of a monetary penalty from a convicted defendant for the victim compensation fund. 1992 Ariz. Sess. Laws, ch. 209, § 2. But that statute was repealed “from and after December 31, 1993,” before Soto committed the instant offenses. 1993 Ariz. Sess. Laws, ch. 243, § 18. Thus, the court lacked authority to impose the assessment pursuant to that statute. *See* A.R.S. § 1-246 (“[An] offender shall

¹Soto’s brief contains approximately ten pages of facts which are irrelevant to the issue raised on appeal. Although the court appreciates appellant’s counsel’s thoroughness, the statement of facts should be “relevant to the issues presented for review.” Ariz. R. Crim. P. Rule 31.13(c)(1)(iv).

be punished under the law in force when the offense was committed.”); *State v. Fell*, 209 Ariz. 77, ¶ 10, 97 P.3d 902, 905 (App. 2004) (“[A] criminal defendant must be punished with the penalty that existed at the time the offense was committed.”).

¶3 Nor did the statutory scheme in place at the relevant time permit the trial court to enter a direct assessment for the victim compensation fund; it instead directed to the fund surcharges imposed on other penalties. 1993 Ariz. Sess. Laws, ch. 243, §§ 3, 12; *see also* A.R.S. §§ 12-116.01, 41-2407. As the state points out, the court did not impose any additional monetary penalties. Thus, the court had no authority to impose the assessment at sentencing.

¶4 The \$25.00 assessment imposed by the trial court is vacated. Soto’s convictions and sentences otherwise are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge